

DIVISION II

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
JOHN B. ROBBINS, JUDGE

CACR 05-1381

AUGUST 30, 2006

DANNY LEE HOOPER  
APPELLANT

APPEAL FROM THE WASHINGTON  
COUNTY CIRCUIT COURT  
[NO. CR-2005-761]

V.

HONORABLE WILLIAM A. STOREY,  
JUDGE

STATE OF ARKANSAS  
APPELLEE

AFFIRMED

Appellant Danny Lee Hooper was found guilty of several offenses by a jury in Washington County Circuit Court. The offenses were kidnapping, robbery, residential burglary, third-degree battery, and three counts of rape, all alleged to have occurred when he entered Ms. Mary Beth Faires's residence on the night of December 21, 2003, and attacked her physically and sexually. Appellant was charged as an habitual offender, and his sentences resulted in a 1320-month prison term. He appeals only the multiple counts of rape, contending that the evidence supports that he was the perpetrator of only a single count of rape, arising from a single criminal episode. The State contends that appellant failed to preserve this specific issue regarding the sufficiency of the evidence for our review. Alternatively, the State argues that there is sufficient evidence from which the jury could conclude that appellant committed three distinct instances of rape against the victim. We conclude that the sufficiency of the evidence is not preserved for appellate review. Consequently, we affirm.

When an appellant challenges the sufficiency of the evidence to support a conviction on appeal, this court's test is whether there is substantial evidence to support the verdict. *Britt v. State*, 83 Ark. App. 117, 118 S.W.3d 140 (2003). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Id.* In determining whether the evidence is substantial, evidence is viewed in the light most favorable to the State, considering only the evidence that supports the verdict. *Id.* The means to challenge the sufficiency of the evidence is via a motion for directed verdict. Ark. R. Crim. P. 33.1(a) (2006). The motion must specifically advise the trial court what element is missing in the State's case, and this motion must be renewed at the close of the evidence. *See id.* The failure to challenge the sufficiency of the evidence in this manner and at the appropriate times constitutes a waiver of any question pertaining to the sufficiency of the evidence supporting the verdict. *Id.* at subsection (c). Rule 33.1 is strictly construed. *Pratt v. State*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Sept. 30, 2004).

In this case, the sixty-eight-year-old victim testified with regard to the rape counts that appellant entered her house as she lay in her bed, he announced that he was going to have sex with her, he fondled her vagina with his fingers, and he had both vaginal and anal intercourse with her. She thought that appellant's attack lasted around fifteen to twenty minutes. Rectal swabs tested for DNA evidenced that appellant rectally penetrated her. At the conclusion of the State's presentation, appellant's attorney moved for directed verdict on two of the three counts of rape, arguing that the proof failed to establish "more than one actual incident of rape." The motion was denied, and appellant testified in his own defense. He admitted that he was drunk that night, that he was a drug addict, and that he entered the victim's house to steal money. He also admitted to being a repeat felon. Appellant expressed regret at what happened, admitting that he vaginally raped the victim, though he did not recall anal

penetration. At the conclusion of the defense presentation, the State declined to present rebuttal evidence, and the trial court presented the jury with instructions upon which to deliberate. The motion for directed verdict was not renewed.

We conclude that appellant failed to comply with the requirements of Rule 33.1 because he failed to make a renewed motion for dismissal at the close of the evidence. Because appellant failed to comply with Rule 33.1, appellant's sufficiency argument is not preserved for appeal.

Affirmed.

GRIFFEN and CRABTREE, JJ., agree.